MAR 4 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1954.

No. 569

UNITED STATES OF AMERICA, ex rel.
NICKOLAS DIANI CIRCELLA,
Petitioner,

vs.

WALTER A. SAHLI, District Director of Immigration and Naturalization, U. S. Department of Justice, Chicago, Illinois,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER.

THOMAS M. TRACEY
32 W. Randolph Street
Chicago 1, Illinois
Attorney for Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

PAGE

Summary

I. Petition herein should be joined with the proceedings in the case of *Marcello* v. *Bonds*, No. 145 now pending before this court in order that this court may decide at one time the related issues therein or in the alternative to delay disposition of the present petition pending a decision in *Marcello* v. *Bonds* aforesaid 1

II. That "Questions Presented" in brief by the respondent in opposition are different from "Questions Presented for Review" by petitioner 5

III. Cases cited in brief by respondent in opposition which pertain to communists are not pertinent and relevant to the questions raised herein 6

Conclusion 7

CITATIONS.

Carlson v. *Landon*, 342 U. S. 524, 536-537 6

Galvan v. *Press*, 347 U. S. 522 (1954) 6

Harisiades v. *Shaughnessy*, 342 U. S. 580 (1952) 6

Marcello v. *Bonds*, No. 145, October Term, 1954, U. S. Supreme Court 2, 3, 4, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1954.

No. 569

UNITED STATES OF AMERICA, ex rel.
NICKOLAS DIANI CIRCELLA,
Petitioner,

vs.

WALTER A. SAHLI, District Director of Immigration and Naturalization, U. S. Department of Justice, Chicago, Illinois,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER.

I.

PETITION HEREIN SHOULD BE JOINED WITH THE PROCEEDINGS IN THE CASE OF MARCELLO v. BONDS, NO. 145 NOW PENDING BEFORE THIS COURT IN ORDER THAT THIS COURT MAY DECIDE AT ONE TIME THE RELATED ISSUES THEREIN OR IN THE ALTERNATIVE TO DELAY DISPOSITION OF THE PRESENT PETITION PENDING A DECISION IN MARCELLO v. BONDS AFORESAID.

In the brief for the respondent in opposition it is stated on page 12, paragraph 3 as follows:

> "We call the Court's attention to the case of *Marcello* v. *Bonds,* No. 145, this Term, now pending on certiorari, in which Marcello has included, in addition to various points wholly unrelated to those here raised, a constitutional argument based on the *ex post facto* clause of the Constitution. This contention is in certain respects relevant to the issue here raised. However, in the light of *Harisiades* v. *Shaughnessy,* 342 U. S. 580, *Galvan* v. *Press,* 347 U. S. 522, and the other decisions herein cited, this constitutional issue is so unsubstantial that there appears to be no reason to delay disposition of the present petition pending a decision in *Marcello,* even if the first ground for denying the petition, *supra,* pp. 8-10, should not be deemed to be decisive."

It is humbly submitted to this Court that the constitutional issue is substantial, and in the case of *Carlos Marcello, petitioner* v. *John M. Bonds,* No. 145 of the October Term, 1954, in the Supreme Court of the United States, the brief for petitioner under the fourth question presented therein makes an exhaustive study and analysis to "the issue of *ex post facto* as applied to deportation". Further, under IV (A) the point is expressly raised that: "The *ex post facto* prohibition forbids retroactive civil legislation". Therein a complete research is made into all the aspects of the *ex post facto* issue.

Moreover, under IV (B) of the said brief for petitioner it is stated as follows: "Deportation involves punishment within the *ex post facto* prohibition". Again, extensive research is made and authority cited in support of the foregoing proposition.

Petitioner herein under his "Questions Presented For Review" raised two questions which were as follows:

> "Was Petitioner deprived of due process of law because he was neither apprised nor forewarned of the consequences of his alleged crimes, to-wit: deporta-

tion, since neither the Immigration Act of 1917 nor the Immigration and Nationality Act of 1952 were in effect at the time of the alleged convictions and sentences?

Was Petitioner deprived of due process of law because he was precluded from seeking a recommendation from the judge imposing sentence that Petitioner be not deported, in pursuance of Title 8 Section 155 (a) of the Immigration Act of 1917 and Title 8 Section 1251 (b) of the Immigration and Nationality Act of 1952, as neither Act was in existence at the time of the alleged convictions and sentences?"

On page 51 of the brief for petitioner in the case of *Carlos Marcello* v. *John M. Bonds,* No. 145 of this term, it was expressly stated:

"Here, however, there was no deportable offense at the time of commission. Here, there was no forewarning. Here, retroactively, a sanction is being imposed far greater than the criminal penalty which petitioner paid in 1938."

Further, on page 54 of the same brief for petitioner it is stated:

"Chief Justice Vinson, speaking for the Court, stated in *Jordan* v. *DeGeorge,* 341 U. S. 223 (1951),

'The Court has stated that deportation is a drastic measure and at times the equivalent of banishment or exile * * * It is the forfeiture for misconduct of a residence in this country. *Such forfeiture is a penalty. Fong Haw Tan* v. *Phelan* 333 U. S. 6, 92 L. Ed. 433, 68 S. Ct. 374, *supra.*' (Italics supplied).

"Can there be any doubt that under the foregoing authorities that the deportation of petitioner who came here as a baby at the age of 8 months would be a penalty and punishment? Would not petitioner prefer being sent to jail for another year under *ex post facto* criminal legislation, rather than being punished *ex post facto* by perpetual exile from his family, his

home, his job and the land where he has resided for over forty years? Of what value is it to surround petitioner with constitutional guarantees of due process if he may be summarily and arbitrarily deported under retrospective legislation?"

On page 55 thereof, it is alleged:

"We seek to provoke further analysis of the *ex post facto* problem, herein, because we believe that reliance upon the erroneous *dicta* of the past should be replaced by an evaluation of the true meaning of *ex post facto* as intended by the constitutional draftsmen. That evaluation will show that historically, the *ex post facto* prohibition was designed to cover civil matters and, therefore, should encompass the instant case. However, even if retroactive punishment be necessary for invocation of the prohibition, realistically, considering substance rather than form, exile and banishment is one of the severest punishments which can be visited retroactively or otherwise upon an individual. We submit that a reconsideration of the problem here posed leads inevitably to the conclusion that the statute herein offends the *ex post facto* prohibition of the Constitution."

Consequently, the issue therein raised in *Marcello* v. *Bonds* now pending before this Court is relative to the issues raised in this petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit, and it is further humbly submitted that writ of certiorari may issue out of and under the seal of this Court directed to the United States Court of Appeals for the Seventh Circuit sitting at Chicago, Illinois, and that this petition be joined with the writ of certiorari to the United States Court of Appeals for the Fifth Circuit in the case of *Marcello* v. *Bonds*, No. 145, October Term, 1954, Supreme Court of the United States, in order that this Court may decide at one time the related issues therein, or in the alternative to delay disposition of the present petition pending a decision in *Marcello* v. *Bonds* aforesaid.

II.

THAT "QUESTIONS PRESENTED" IN BRIEF BY THE RESPONDENT IN OPPOSITION ARE DIFFERENT FROM "QUESTIONS PRESENTED FOR REVIEW" BY PETITIONER.

Petitioner herein under his "Questions Presented For Review" raised two questions which were as follows:

> "Was Petitioner deprived of due process of law because he was neither apprised nor forewarned of the consequences of his alleged crimes, to-wit: deportation, since neither the Immigration Act of 1917 nor the Immigration and Nationality Act of 1952 were in effect at the time of the alleges convictions and sentences?
>
> Was Petitioner deprived of due process of law because he was precluded from seeking a recommendation from the judge imposing sentence that Petitioner be not deported, in pursuance of Title 8 Section 155 (a) of the Immigration Act of 1917 and Title 8 Section 1251 (b) of the Immigration and Nationality Act of 1952, as neither Act was in existence at the time of the alleged convictions and sentences?"

In the brief for the respondent in opposition, respondent stated under "Questions Presented" that the questions were as follows:

> "1. Whether petitioner was denied due process of law in that the conviction which formed the basis for his deportation under Section 19 of the Immigration Act of 1917, as amended, occurred prior to the enactment of the 1917 Act.
>
> 2. Whether petitioner was denied due process of law in that the two convictions which formed the basis for his deportation under Section 241 of the Immigration and Nationality Act of 1952 occurred prior to the enactment of the 1952 Act."

Thus, it can be seen that the "Questions Presented For Review" by petitioner and the "Questions Presented" as

set forth by the respondent are distinctly different, as the "Argument" propounded by petitioner in his petition for writ of certiorari manifests.

III.

CASES CITED IN BRIEF BY RESPONDENT IN OPPOSITION WHICH PERTAIN TO COMMUNISTS ARE NOT PERTINENT AND RELEVANT TO THE QUESTIONS RAISED HEREIN.

Respondent on pp. 11 and 13 has cited the cases of *Harisiades* v. *Shaughnessy,* 342 U. S. 580, and *Galvan* v. *Press,* 347 U. S. 522, both of which dealt with communists and Congress did not grant the same protection and privileges to communists under the deportation acts as it did to those convicted of crimes involving moral turpitude. Then, too in both of said cases the aliens concerned had been forewarned; here there was no forewarning nor apprisal as is more fully stated in the "Argument" of the petitioner herein filed.

Respondent on pp. 9 and 12 cited the case of *Carlson* v. *Landon,* 342 U. S. 524, 536-537, which also dealt with communists, and the standards and criterions set up by Congress for the communists were not the standards and criterions set up by the Congress for aliens convicted of crimes involving moral turpitude as aforestated.

CONCLUSION.

For the reasons stated it is respectfully submitted that writ of certiorari may issue out of and under the seal of this Court directed to the United States Court of Appeals for the Seventh Circuit sitting at Chicago, Illinois, and that this petition be joined with the writ of certiorari to the United States Court of Appeals for the Fifth Circuit in the case of *Marcello* v. *Bonds*, No. 145, October Term, 1954, Supreme Court of the United States, in order that this Court may decide at one time the related issues therein, or in the alternative to delay disposition of the present petition pending a decision in *Marcello* v. *Bonds* aforesaid.

Respectfully submitted,

Nickolas Diani Circella,
Petitioner,
By: THOMAS M. TRACEY,
His Attorney.